

# How does the australian criminal justice system respond to domestic violence essa...

[Law](#), [Criminal Justice](#)



## **What are the strengths and weaknesses of this response?**

Violence in our modern-day society can take a myriad of forms, but its basic definition always includes an unjust or unwarranted exertion of force or power. Since the recent history of domestic violence provides a clear illustration of the social construction of the field of violence, it will serve as a tool to demonstrate the problematic nature of the system of criminal laws when applied to crimes of violence. This essay is designed to outline the strengths and weaknesses of the criminal system's response to domestic violence in Australia. The first part of the paper provides information essential to the understanding of the crime – its definition, the types of behaviour categorized as domestic violence, and the impact it has on society. Second, a discussion of the strengths of the criminal system's response will provide the reader with analysis of the comprehensive National Plan to Reduce Violence Against Women and their Children 2010-2022 and the change in policy as regards accommodation of victims of domestic violence brought by a recent policy reform. Third, a discussion of the weaknesses of Australia's approach to domestic violence will be provided, focusing on the discrepancy between legislative intent and its implementation, the issue of minimisation of harm and the problematic nature of reviewing homicide cases committed by victims of domestic violence against their partners.

The term “violent crime” involves crimes such as assault, homicide, robbery, kidnapping and sexual assault. Assault, being the crime occurring most frequently, and homicide could be divided in two types: crimes perpetrated in public and those perpetrated in the victim's home. Since the purpose of

this paper is not to engage the reader with a description of the different types of violent crimes but to assess the response of the criminal system to it, the specific topic of domestic violence has been chosen to illustrate the issues in a more consistent way.

Domestic violence involves acts of violence between people who have, or were involved in, an intimate relationship (Morgan and Chadwick, 2009).

Most acts of domestic violence are perpetrated by a male against his female partner, but the general term includes violence by women against men, and violence occurring within same-sex or other alternative forms of relationships as well. Moreover, it is important to highlight that the scope of the term includes not only physical violence but also emotional, sexual and psychological abuse of the partner. The National Council to Reduce Violence against Women and Children (NCRVWC) found that:

a central element of domestic violence is that of an on-going pattern of behaviour aimed at controlling one's partner through fear (for example, by using violent or threatening behaviour) and can be both criminal and non-criminal in nature.

Domestic violence can take a myriad of forms. Section 13 of the Domestic Violence and Protection Orders Act (DVPOA) defines the behaviours classified as domestic violence as causing physical or personal injury, damage to the property of a relevant person, or any threats thereof, as well as harassment or offensive behaviour. In its most clear form, it involves physical abuse such as inflicting injuries to the body of your partner, the use or threatening to use weapons, or sleep and food deprivation. Emotional abuse is another form of domestic violence which can be exerted in many ways but eventually leads

to undermining the self-esteem and humiliation of the other person. In such cases the victim is often verbally abused in private or in public. Psychological abuse can be differentiated from emotional abuse in that it involves threatening the victims with social exclusion, sole custody of a child etc. rather than humiliating them or hurting their feelings. Psychological abuse can also lead to detrimental effects on the children who would also often blame the mother for the situation even when their father was the perpetrator (Liebermann and Zeanah, 2011). Last but not least, domestic violence sometimes involves sexual abuse—any form of unwanted sex or sexual degradation is considered to fall into this category (Mitchell, 2011). It is important to provide an outline of the extent of the instances of domestic violence in Australia and their impact on society. Domestic violence, be it in its physical, emotional or psychological form, leads to a long-term deterioration of the victim's physical health or mental condition. The Australian Longitudinal Study on Women's Health shows that women who have been the victims of domestic violence use health services more frequently than other women, even after they are no longer exposed to the violence. According to Chan and Payne (2013) who concluded the National Homicide Monitoring Program (NHMP) Annual Monitoring report N. 21, 66% of all domestic homicide incidents were perpetrated by the intimate partner of the victim. Domestic violence often leads to Post-traumatic Stress Disorder (PTSD), depression and suicidal ideation (Randle and Graham 2011). Violence against women and their children cost the Australian economy an estimated \$13.6 billion in 2008-2009.

The recent development of methodologies and mechanisms through policy

reforms and campaigns to decrease the level of domestic violence is one of the strengths of Australia's response to domestic violence. The National Council has developed a comprehensive National Plan to Reduce Violence Against Women and their Children 2010-2022. In a background paper to the "Time for Action" plan the Council defined three types of methods to decrease the levels of domestic violence – primary and secondary prevention and tertiary intervention. Primary prevention encompasses all types of intervention which could take place before domestic violence has actually occurred. It involves promoting attitudes and behaviour to enhance respectful relationships and gender equality; and altering environments to make them safer for women. Secondary prevention techniques involve activities which seek to improve attitudes of people in situation where there are early signs of domestic violence. Tertiary intervention refers to the imposition of criminal sanctions for the perpetrators and an emphasis on rehabilitation programs for both victims and offenders.

The "Australia Says No" campaign is an example of the primary prevention methodology to eliminate domestic violence. The campaign was launched in 2004 and aimed to increase the awareness of society of the pressing problems of sexual assaults and domestic violence. As part of this campaign, both victims and (potential) perpetrators could obtain practical assistance through a 24-hour help line. The Australian Domestic and Family Violence Clearinghouse and the Australian Centre for the Study of Sexual Assault are national resource centres which are engaged in collection and dissemination of valuable practices, research and policy information on Australian domestic and family violence. "White Ribbon" is the current campaign of Australia to

stop violence against women. As Latrobe Mayor Michael Gaffney underlined, “ violence directed at anyone – male or female should not be part of any caring society”.

The secondary prevention and tertiary intervention methodologies involve various measures to help victims of an on-going situation of domestic violence. For example, all jurisdiction in Australia currently provide for a procedure which allows courts to prohibit a perpetrator of domestic violence from remaining in a premise, requiring him to find alternative accommodation. This could be seen as one of the strengths of Australia’s response to domestic violence, as this presents one of the improvements recently brought by reform (Murray, 2008).

The most serious deficiency in the criminal justice system lies in the fact that legislative intent in the field of domestic violence laws often does not correspond to the implementation of those same mechanisms. In practice, domestic violence is still dealt with mainly as part of the civil laws of the jurisdiction. This happens due to the fact that applying criminal law in cases of domestic violence is often problematic. Issuing a domestic violence protection order under the DVPOA is often more effective in the short term due to the high standard of proof of “ beyond reasonable doubt” which needs to be demonstrated for a successful conviction for a criminal offence. However, the act stipulates that domestic violence offence means an offence of contravening such a protection order. The penalty for breaching a protection order in Queensland, for example, is a maximum of 1 year imprisonment which could be increased in case of a third or subsequent conviction. This inevitably leads to the conclusion that dealing with domestic

violence cases in such a manner might not always achieve the necessary degree of dissuasive effect upon the perpetrator and as a result, might often put the victim in a greater risk.

Despite the demonstrated commitment of government authorities to increase awareness and decrease the levels of domestic violence in Australia, there is a problem of minimisation of harm in the response of the relevant authorities to domestic violence. Research analysing court files related to prosecutions in cases of domestic violence in Queensland (Douglas, 2011) shows that there are still significant deficiencies in the way the system of prosecution of domestic violence works. The study shows an established tendency of minimisation of harm by both the police and the prosecution authorities. Lack of prosecution or charging the perpetrator with a less serious offence is evidenced by comparison of facts present in the police descriptions, which often refer to assault, stalking or intimidation and the actual terms of the protection order. This demonstrates that the non-interventionist attitude of police authorities in domestic violence cases is still present. One of the reasons for this is unwillingness of victims to cooperate with the police or prosecution because they either feel intimidated by the perpetrator or because they are reluctant to testify against their partner even when he/she has physically or emotionally abused them. On other occasions the minimisation of harm is caused by negotiation by the police prosecutors with the alleged perpetrators, which often leads to bargaining and withdrawal of certain charges in return for the perpetrator accepting a plea of guilty on one of the breach charges. In effect, the difficulty of proving the elements of a more serious criminal charge beyond reasonable doubt

have created a situation where both police and prosecution are seeking to establish a more simplified way to charge the perpetrator. By way of analogy as demonstrated by the previous analysis, however, such convictions are often far from the reality of the case and as such, do not provide a sufficient guarantee for the victims and do not produce the dissuasive effect that is the rationale behind the system of criminal sanctions.

Another problem of the law's response to domestic violence is evident when reviewing homicide cases in which the victim of domestic violence kills the perpetrator. Such a situation is another example of the law as it stands being ineffective when applied to the circumstances and facts of a case. The problem is evident in cases of strict application of the doctrine of self-defence in its narrow definition. Self-defence could serve as a justification defence before courts but it would be only accepted if a set of elements are fulfilled, i. e. if the attack was imminent, if serious harm was (to be) caused, if there was no option to retreat and if the response was proportionate to the harm caused. However, a strict application of this test fails to take into account the entirety of circumstances leading to the homicide in cases of prolonged situations of domestic violence, e. g. the defendant's previous experience with similar attacks. The practice of relying on expert witnesses testifying on the battered women syndrome (Bradfield, 2002) allows for the introduction of the context necessary for jury to comprehend the entirety of circumstances of such a case and the previous experience of female victims of domestic violence who kill their violent partner. This approach, however, could be criticised on the grounds of shifting the focus from the facts and circumstances of the case to the psychological state of the defendant.



The present analysis demonstrated the strengths of Australia's approach to domestic violence and the difficulties of the criminal system in providing an effective response. The strengths of the system lie in the ex-ante approach taken by the National Council in promoting awareness and investing in prevention and intervention programs. The main problems with the current approach are with the implementation of the existing legislation. Because of the high standard of proof of "beyond reasonable doubt" for the more serious criminal offences such as assault, authorities often resort to dealing with the case as a civil matter, or issuing a protection order. It was argued that financial penalties, or the minimum incarceration period for breach of the order envisaged by most jurisdictions' codes do not fulfil the necessary dissuasive function of a criminal sanction. Other weaknesses of the approach relate to the trend of minimising the harm of victims, especially in cases of homicide committed by women as a defensive response to domestic violence.

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Legislation:

- Domestic and Family Violence Protection Act 1989
- Domestic Violence (Family Protection) Act 1989 (Qld), s 80( 1Xb).